No. 85-1032

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

– against –

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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February 6, 1986

EDITOR'S NOTE

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PETITIONER'S REPLY BRIEF

The respondents' very competent counsel skillfully obliterate the Second Circuit holdings and issues with arguments having little to do with the petition.

Diminution of Public Access: Question #3

The Project will retroactively destroy 65% to 70% of all adult peep machine 8 mm. film exhibition in the City. City zoning makes relocation impossible. The Second Circuit held there was no substantial diminution of public access. It ruled that the court should not "distinquish between the specific types of use *** [but must] consider them collectively," that petitioner was engaged in "use-fragmentization [not] constitutionally mandated," and that 8 mm. film exhibition was the same as "adult movies, topless bars, swingers' clubs, ***" as well as "*** books, magazines, movies, video cassettes and live shows purveying the same

information" (App-22-23).[1]

Intending no disrespect, we submit there is no First Amendment basis whatsoever for this preposterous proposition. Understandably then, respondents don't address that issue but bury it.

Respondents claim that the Circuit Court "rejected petitioner's statistical analysis ***" and noted that "[s]ex-related establishments represent *** only 5% of all businesses" to be displaced. Respondents then urge the fact that "City zoning prevents relocation" is supposedly irrelevant because petitioner can relocate with less than five machines, and that retroactive destruction is immaterial because the Project involves condemnation and not a

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1 "App" is the designation of the opinions reproduced in the petition appendix. Any numbers preceded by "A" refer to the Second Circuit joint appendix.

"'retroactively applied zoning regulation'" (Res.Br. pp. 12, 19 n.*, 20 n.*, 23, 27 and 28).

Most of the foregoing has no relevance to this question. The Second Circuit holding was not predicated on the rejection of any statistical analysis or the possibility of relocation with only four machines.[2] Its diminution of access reasoning presents the issue of whether the right to visit a topless bar, etc. or the right to purchase adult books, etc. can all be equated with the right to view an 8 mm. adult film for 45-55 seconds for 25 cents? The answer

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2 As a matter of fact the reduction to four machines alters the percentage of permanent elimination only in the most miniscule fashion. Further, neither petitioner nor any other adult store can economically survive in any location with only four machines. Thus petitioner presently has approximately 115 machines. The suggestion that petitioner or any other store with peep shows could survive with only four machines is absurd.

should be obvious.

The need for review is emphasized by respondents' claim that the Young[3] progeny condemning zoning retroactive destruction have no application because this "Project is a condemnation plan" (Res.Br. pp. 27, 28). What respondents really urge is that with condemnation, diminution of public access is to be determined not by the First Amendment rationale of the Second Circuit, but under the Berman v. Parker, 348 U.S. 26 (1954), due process rationally related test. Review of Question #3 is clearly merited.

Motive and Equal Protection:
Question #2

Respondents obscure the mixed motive issue presented by Playtime Theaters, Inc. and Village of Arlington

3 Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

Heights and the intertwined First Amendment and Equal Protection clause questions. They also rely on Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949), aff'd., 339 U.S. 605 (1950).

Respondents assert the district court "rejected petitioner's argument that elimination of [adult uses] was the primary motivation of the Project" (Res.Br. p. 11), omitting the district court's underscoring of the words "primary motivation" (App-37, emphasis that of the district court). Petitioner never urged and need not show that elimination of adult uses was the primary motive. The district court was ruling on a point petitioner did not make.

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4 Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527 at 537 (CA 9 1984), jur. noted, 85 L.Ed.2d 297, No. 84-1360, argued November 12, 1985; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 at 265-266 (1977).

No matter how legitimate and predominant the goals of new office buildings, subway renovation, crime elimination, etc. may be, nonetheless the fact remains that one (not the only, but one) of the Project purposes is the permanent replacement of adult uses with legitimate tenants.

The 1980 Memorandum of Understanding between the City and UDC was entered into to eliminate not only physical and social blight but <u>also</u> "undesirable uses" (App-4, A-16).

While fast food restaurants and liquor stores contribute to blight, nonetheless the FEIS states specifically that "<u>there will be no action or pornographic movies, sex-related establishments</u> ***." However, the FEIS simultaneously proclaims that the Project will contain fast food restaurants and liquor stores (FEIS pp. 2-94, 2-95,

emphasis supplied). In short, only speech uses are permanently replaced for blight they do not cause.

When the Project states that blight rehabilitation cannot be achieved without the permanent replacement of only speech uses and there is official hostility, this is not merely a "subjective motivation" of some Project proponents to eliminate speech and the Project goals are not unrelated to speech suppression, as the Second Circuit held (App-19). Such proclamations are part of the official policy even though speech destruction may not be the primary motivation.[5]

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5 In addition to the FEIS, the record summarized in the petition shows endless government pronouncements such as those of Governor Cuomo that the Project goals include the permanent replacement of sex uses by "desirable" or "positive" tenants. Post-litigation affidavits of no intent to discriminate cannot eradiate all of these statements or alter the basic underpinning of the FEIS that speech uses must be permanently replaced to achieve rehabilitation.

Respondents cite Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), and note that 406 businesses will be replaced and that adult uses are also subject to displacement (Res.Br. pp. 22, 23). Reading the respondents' brief one would believe that under Schad unless there is a total ban of adult First Amendment activities then there are never any viable issues of mixed motive, whether state action is unrelated to speech suppression, or whether speech uses are impermissibly being singled out. That is just not so.

Finally respondents, citing O'Brien[6] and Young, claim that motive to destroy speech is irrelevant and that the state interests are unrelated to suppression of free expression (Res.Br. pp. 23, 24).

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6 United States v. O'Brien, 391 U.S. 367 (1968).

The O'Brien holding that "legislative motive" is irrelevant was announced in the context of an attack on the facial invalidity of a statute. This case is in no way concerned with the facial invalidity of any statute.

Respondents then assert that "[s]imilarly in Young" the Court found substantial interest "even in the face of the finding of hostility to adult uses" (Res.Br. p. 24). This is legally unintelligible. If respondents mean that Young held motive is irrelevant that is not the law.[7] The last portion of Mr. Justice Powell's Young footnote four states that "an intent or purpose to restrict the communication itself because of its nature would make the O'Brien test inapplicable." 427 U.S. at 81, 82 n.4.

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7 We refer the court to our petition, page 13, for other cases.

Turning to respondents' hostility argument, Young did not find there was official hostility to adult theaters. The pertinent finding was that the concentration of adult theaters caused blight and therefore location restrictions were justified. 427 U.S. at 55, 71 n. 4, and Mr. Justice Powell at 82 (discussed infra).

The respondents also try to avoid review by citing Graver, 336 U.S. 271 at 275 (1949), aff'd., 339 U.S. 605 at 609-610 (1950), claiming that certiorari petitions are not granted to review concurrent factual findings of lower courts (Res.Br. p. 17 n.*). Graver involved a patent case, and concerned finality where there was "conflicting testimony" of expert witnesses. 336 U.S. at 274, 275. This case involves the

First Amendment and issues of constitutional law.[8]

No Contribution To Blight; Due Process Not Applicable: Question #1

Respondents say that the "findings of blight" result from years of well-documented studies referenced in the FEIS. Respondents claim that this differentiates the Project from cases cited by petitioner such as Basiardanes v. City of Galveston, 682 F.2d 1203 at 1215 (CA 5 1982), because in Basiardanes there was "an 'empty' record" (Res.Br. p. 21 n.*).[9]

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8 More appropriate is Bose Corp. v. Consumers Union of the United States, Inc., ____ U.S. ____, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984).

9 The Basiardanes record was empty because there was "[N]o evidence *** to bolster the City Council's assumption that the adult theater located downtown and urban blight are linked." 682 F.2d at 1215, 1216.

The respondents twist the holdings to obscure the point. The issue is not whether the studies are extensive. The question is whether the findings demonstrate a causal connection between the presence of adult uses and blight. That is the sine qua non for the government substantial interest. Young, 427 U.S. at 55, 71 n. 34. As Mr. Justice Powell states it, Young "would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas." 427 U.S. at 82.

The FEIS does make an exhaustive analysis purporting to show how sex-related uses supposedly contribute to blight and therefore must be permanently replaced by legitimate stores to rehabilitate the area. However the documents show and the district court found that

adult uses do not contribute to blight (App-46; A-51-61).

The Second Circuit holds that this is immaterial by: (a) relying on Young (but ignoring its fact predicate that adult theater concentration contributes to blight), and; (b) then applying the Berman v. Parker due process rationally related test (App-18). Schad of course rejected a due process approach in gauging the power of the government to regulate land use control, zoning or otherwise. 452 U.S. at 68, 69.

To mask the importance of this issue the respondents again try to make it sound as if this Schad holding is applicable only where there is a total or near total ban on First Amendment activities. (Res.Br. p. 20 n.*, and see p. 22).

Indeed while not stating it in precisely these terms, that part of the Second Circuit's opinion dealing with constitutional issues treats this case as if it is controlled by due process while trying to bring it within the ambit of O'Brien-Young. This unprecedented application of due process because the Project is big and involves condemnation merits this Court's review.

Least Drastic Means and Summary Judgment Conversion Without Notice: Questions #4 and #5

Mindful of this Court's staggering work load we combine these questions.

Respondents say the district court found that police sweeps focus only on one of the blight factors with limited success and therefore there is no fact issue (Res.Br. p. 25, 28 n.*).

However, what the respondents forget to add is that the district court ruled there was no fact issue on this point because it completely misread the petitioner's preliminary injunction papers.[10]

This summary judgment conversion point has consequences far beyond this case.

Rule 12(b)(6) says that if matters outside the pleadings are not excluded by the court then the dismissal motion shall be treated as one for summary judgment. The Second Circuit has re-

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10 Petitioner's claim was: (a) that police sweeps had been successful in areas outside the Project area, not in the area (App-48), but; (b) were deliberately not used in the Project area to justify the condemnation. It is not possible to determine the latter without depositions. If there had been compliance with Rule 56 perhaps this would have been clarified.

drafted the last portion of this Rule so it reads that when the foregoing occurs Rule 56(c) and (f) shall not apply.

Contrary to respondents' statement (Res.Br. p. 29), such interpretation is in direct conflict with most circuits (see Pet.'s br., p. 20 n. 14).

Respondents cite Romero v. Int'l. Terminal Operating Co., 358 U.S. 354, 357 n.4 (1959) (Res.Br. pp. 29, 30). That case did not involve summary judgment. We do not read Romero footnote four as dispensing with a Rule 56 motion.

The Second Circuit imposes a totally unnecessary burden on litigants which most of them cannot afford. Under the Second Circuit holding every time a plaintiff moves for preliminary injunction and there is a motion to dismiss, the plaintiff must treat it as if there

was a summary judgment motion requiring additional papers. Thus they have to comply in advance with Civil Rule 3(g)[11] which is probably similiar to the rules of other district courts.

Attorneys are not going to risk being second-guessed as to whether they should "reasonably have recognized" the possibility of conversion (App-13). There is a simple alternative to this unnecesary additional work. The district court should give notice of intent to convert. That is what most circuits hold and is an issue which should be resolved by this Court.

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11 United States District Courts for the Southern and Eastern District of New York, Civil Rule 3, Motions. Subparagraph (g) dealing with summary judgment requires that there be a separate statement of material facts disputed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

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